

EXTRA INFO. 10/3/06

Don Johnson

From: William Solomon

Sent: Tuesday, October 03, 2006 6:25 PM

To: Don Johnson; John Murray; Frits Riep; 'Frits Riep'; John Covert; mark.eisenberg@microsoft.com

Subject: RE: Acton - Verizon Final License

Folks

Here are my written responses to the questions posed by Selectmen Magee. I do not have Selectmen's Magee's e-mail address.

Bill Solomon

10/3/2006

Don Johnson

From: Andrew Magee
Sent: Monday, October 02, 2006 10:36 PM
To: Don Johnson; John Murray
Cc: Walter Foster (office)
Subject: Verizon license

Having read through the draft Verizon cable license I have a couple of questions/comments that I would like to have addressed tomorrow night. These include (but are not limited to):

- 1) At 3.1.1 it states that the "licensee shall offer Cable Service to a significant number of residents in the Service Area within twelve (12) months." What is the definition of a "significant number." Should that be quantified in the license?
- 2) It sounds as if Verizon would have no incentive to offer the services listed at 5.8 and 5.9, even if such services are offered in other towns and cities. Wouldn't we want such basic service?
- 3) The minimum insurance requirements at 9.1.1.1, 9.1.1.2 and 9.1.1.4 seem extremely low.
- 4) Is the definition of "Town" adequate in 9.2.1?
- 5) Are the phrases "a reasonable time," "as soon as reasonably possible" and "reasonable satisfaction" adequate in 13.1 and 13.2?
- 6) In the discussion of Liquidated Damages at 13.6.1 and 13.6.2 the fines are \$100 per day and remain that for the full 15 years of the license. Given the likelihood of some inflation over this time, the implication is that the fine decreases over time. This is somewhat addressed in 13.6.3. Ultimately all of these numbers seem low and are at a scale comparable to those issued by the Town animal control officer. With the \$10,000 cap do we run the risk of having a problem that for the applicant it is easier to pay the fine than fix?

I have a few other questions that are for my edification rather than clarification in the license, so I will save those for tomorrow's discussion.

Thank you.

-Andy

10/3/2006

Response to Questions Posed By Selectmen Magee

Prepared By William Solomon – Special Cable Counsel

October 3, 2006

1) At 3.1.1 it states that the "licensee shall off Cable Service to a significant number of residents in the Service Area within twelve (12) months." What is the definition of a "significant number." Should that be quantified in the license?

Response – I agree that this language is vague and poorly drafted. I advised the manager of the first Town I represented in Verizon negotiations to require something more definitive. He decided not to do so, in large part because most of the 1st stage – aerial plant – was already built. To my knowledge most Verizon cable franchises both in the Commonwealth (although I have done 10 of the 18 Massachusetts Cable Licenses) and across the country have this same gobbly-gook. My advise has been to have Verizon state in writing, or at the very least on the hearing transcript record what is now complete and what will be completed in the 12 month period.

2) It sounds as if Verizon would have no incentive to offer the services listed at 5.8 and 5.9, even if such services are offered in other towns and cities. Wouldn't we want such basic service?

Response - Section 5.8 – Listing of PEG Access Channels on Licensee's Electronic Program Guide and Section 5.9 PEG Access Video-on-Demand are provisions I included in my first Verizon License, and have remained in all other Verizon Licenses I have done for Massachusetts towns, despite Verizon's desire to eliminate these provisions. I believe, at least last I looked, that these licenses are the only Verizon cable franchises in the nation to address these issues in any manner. While there is not a commitment to provide PEG Access EPG or VOD, I believe that this language increases the possibility that these services will be provided to Acton.

3) The minimum insurance requirements at 9.1.1.1, 9.1.1.2 and 9.1.1.4 seem extremely low.

This is a Town issue that I cannot decide for the Town. That being said, I am comfortable with the minimum insurance amounts given the excess/umbrella coverage of \$5 million in Section 9.1.1.5. (Please note that I am unfamiliar with Employers' Liability Insurance required by Section 9.1.1.4 since I do not normally require such insurance and have not looked into it. That being said, it does appear based on the language of Section 9.1.1.5 that the excess/umbrella coverage would apply to this too.)

4) Is the definition of "Town" adequate in 9.2.1?

Response – In my opinion the term “Town” as used in Section 9.2.1 – the “Indemnification” provision is adequate given the addition of “its officials, boards, committees, employees and agents (hereinafter referred to as the “Town” for purposes of this Section 9.2)

5) Are the phrases "a reasonable time," "as soon as reasonably possible" and "reasonable satisfaction" adequate in 13.1 and 13.2?

Response – I agree that cable companies, including Verizon, can drive a sane person crazy with their desire to protect themselves (not others) with modifiers such as "reasonable". That being said, I am "reasonably" comfortable with the uses of the term here, and would recommend leaving the language as is in the context of an agreement between the parties.

6) In the discussion of Liquidated Damages at 13.6.1 and 13.6.2 the fines are \$100 per day and remain that for the full 15 years of the license. Given the likelihood of some inflation over this time, the implication is that the fine decreases over time. This is somewhat addressed in 13.6.3. Ultimately all of these numbers seem low and are at a scale comparable to those issued by the Town animal control officer. With the \$10,000 cap do we run the risk of having a problem that for the applicant it is easier to pay the fine than fix?

Response – Section 13.6 - the liquidated damage provision as written, provides that:

Such liquidated damages shall not be a limitation upon any other remedy available under the provisions of this License or applicable law; provided, however, that in the event the Issuing Authority collects liquidated damages for a specific breach for a specific period of time, pursuant to this Section 13.6, the collection of such liquidated damages shall be deemed to be the exclusive remedy for said specific breach for such specific period of time only.

That being said, your comment is well taken and appreciated, and as a result I have obtained the following changes to this Section.

13.6 Liquidated Damages: The parties agree and acknowledge that the Licensee's failure to comply with certain provisions of this License will result in injury to the Issuing Authority, the extent of which will be difficult to estimate. As such, the parties agree to the liquidated damages provided for in this Section 13.6, ~~with such liquidated damages representing the parties' best estimate of the damages resulting from the specified noncompliance, and that said liquidated damages, if imposed by the Issuing Authority pursuant to the terms of this License,~~ are fair and reasonable compensation for such damage. Any such liquidated damages shall be assessed as of the date that the Licensee received written notice of the provision(s) with which the Issuing Authority believes the Licensee has failed to comply, provided that the Issuing Authority has made a determination of default in accordance with the procedures set forth in Sections 13.1 through 13.4. Such liquidated damages shall not be a limitation upon any other remedy available under the provisions of this License or applicable law; provided, however, that in the event the Issuing Authority collects liquidated damages for a specific breach for a specific period of time, pursuant to this Section 13.6, the collection of such liquidated

damages shall be deemed to be the exclusive remedy for said specific breach for such specific period of time only.